

Cash Cow: The Futility of Monetary Sanctions as a Deterrent for Post-Election Litigation Abuse

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INTRODUCTION

In the two months after losing the 2020 presidential election, then-President Donald Trump and his Republican allies raised a staggering \$255.4 million for their “Official Election Defense Fund.”¹ The Trump team used a three-pronged strategy to raise these funds while striving to overturn the election results and bolster the defeated president’s political standing. The first prong was a legal campaign, where Trump-allied attorneys filed more than fifty lawsuits in key battleground states attempting to block the certification of election results.² The second was a disinformation campaign, where Trump and allies utilized social media, traditional media, and legal filings to promote false notions of election fraud to sway public opinion.³ The final prong was a fundraising campaign, where Trump and others leveraged the filing of frivolous lawsuits to raise millions of dollars from Republican supporters.⁴ The effort culminated on January 6, 2021, when hundreds of Trump-aligned rioters attacked and breached the U.S. Capitol while Congress was certifying Joseph Biden’s electoral college victory.⁵ A federal judge called one of the frivolous lawsuits “a historic and profound abuse of the judicial process.”⁶

Courts can deter abuse of the judicial process through a host of statutes as well as procedural and ethical rules. However, courts have not utilized these tools effectively against Trump’s litigation abuses. This Note will argue that monetary

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1. See Jemima McEvoy, *Trump Raised \$250 Million Since Election to Challenge Outcome—Here’s Where Most of the Money Will Actually Go*, FORBES (Jan. 31, 2021), forbes.com/sites/jemimamcevoy/2021/01/31/trump-raised-250-million-since-election-to-challenge-outcome-heres-where-most-of-the-money-will-actually-go/?sh=2ddaff5a8824 [https://perma.cc/F68D-CKQJ].

2. Colleen Long & Ed White, *Trump thought courts were key to winning. Judges disagreed*, ASSOCIATED PRESS, Dec. 8, 2020, <https://apnews.com/article/donald-trump-courts-election-results-e1297d874f45d2b14bc99c403abd0457> [https://perma.cc/3PJVJ7FU].

3. See, e.g., Philip Bump, *A Year of Election Misinformation from Trump, Visualized*, WASH. POST (Feb. 11, 2021), <https://www.washingtonpost.com/politics/2021/02/11/year-election-misinformation-trump-visualized/> [https://perma.cc/T62E-GQWV].

4. McEvoy, *supra* note 1.

5. Philip Rucker, *Bloodshed*, WASH. POST (Oct. 31, 2021), <https://www.washingtonpost.com/politics/interactive/2021/what-happened-trump-jan-6-insurrection/> [https://perma.cc/JQL8-EXW3].

6. King v. Whitmer, 556 F. Supp. 3d 680, 688 (E.D. Mich. 2021).

sanctions are ineffective deterrents against election litigation abuse by Trump-aligned attorneys because those attorneys can rely on funds raised through the litigation to pay any sanctions. Instead, courts and disciplinary authorities should discipline attorneys with severe professional sanctions, like disbarment or suspension. Part I of this Note will detail the 2020 post-election litigation efforts, including the accompanying disinformation and fundraising schemes. Part II will analyze court-issued monetary sanctions under Federal Rules of Civil Procedure Rule 11, 28 U.S.C. § 1927, and courts' inherent authority; application of these rules in 2020 election litigation; and the effect of fundraising efforts on the efficacy of those sanctions. Part III will analyze relevant Rules within the ABA's *Model Rules of Professional Conduct* and how they have been applied so far in 2020 election litigation. Part IV will argue that, when faced with frivolous election litigation that operates as a fundraising scheme, courts and disciplinary authorities should favor attorney discipline under the jurisdiction's professional rules over monetary sanctions to deter future misconduct. It will continue to propose one feasible way for courts to accomplish this and will analyze potential drawbacks and counterarguments to this approach.

I. BACKGROUND

From the minute that the final polls closed to the minute Joe Biden was inaugurated, more than 50 Trump-backed lawsuits were filed and argued in key battleground states across the country.⁷ This prong of Trump's effort was unsuccessful at leveraging courts to overturn states' election results.⁸ Federal and state courts at all levels overwhelmingly rejected Trump and allies' attempts to prevent certification of election results, as nearly all of the suits lacked factual evidence or sound legal claims.⁹ The Supreme Court twice denied conservative efforts to block the certification of election results in battleground states.¹⁰ And some lower courts expressed shock at the lack of factual evidence and the incredible form of relief sought by Trump and his allies.¹¹

While the first prong may have been unsuccessful in using courts to substantiate claims of voter fraud, the second prong leveraged courts to push a public narrative of voter fraud as part of its disinformation campaign. The strategy likely attempted to borrow credibility from the judicial system, as Americans have

7. See Long & White, *supra* note 2.

8. See *id.*

9. See, e.g., Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020) (holding that "this Court finds no basis in fact or in law" to grant relief that would "breed confusion, undermine the public's trust in the election, and potentially disenfranchise of (sic) over one million Georgia voters"); Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 Fed. Appx. 377, 391 (3d Cir. 2020) (writing "[v]oters, not lawyers, choose the President"); Feehan v. Wis. Elections Comm'n, 506 F. Supp. 3d 596 (E.D. Wis. 2020) (writing "[f]ederal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so").

10. Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020); Kelly v. Pennsylvania, 141 S. Ct. 950, 950 (2021).

11. See Wis. Voters Alliance v. Pence, 514 F. Supp. 3d 117, 121-22 (D.D.C. 2021).

consistently indicated that they trust the judicial branch more than the other two branches of government.¹² The effort convinced many people. Public opinion polling suggests that more than half of Republicans believed that the election was fraudulent two months following the election, a number that increased during 2021.¹³ Republican-controlled state legislatures seized this voter fraud narrative to adopt new restrictions on voting.¹⁴

Seeing this effort, some members of the legal community called for disciplinary actions against the attorneys behind Trump's election litigation, seeking sanctions and disbarment.¹⁵ Judges and disciplinary authorities have agreed in some cases, with others currently pending.¹⁶

However, the third prong of the campaign—the fundraising arm—continued to bring in cash even as Trump's attorneys faced pushback from members of the legal community for their efforts.¹⁷ During the post-election period, as Trump and his allies brought lawsuits in multiple states, Trump's campaign sent multiple emails to supporters requesting donations for its "Election Defense Fund."¹⁸ The fund appeared on its face to support election challenges, but the fine print stated that the first \$5,000 of any donation went to Trump's Save America PAC and the next \$3,300 went to the Republican National Committee.¹⁹ Therefore, only donations *over* \$8,300 went to the recount committee—the fund designated to pay for the promoted legal challenges.²⁰ As noted, the fundraising strategy amassed more than \$250 million across Save America, the RNC, and shared PACs.²¹ Conversely, by

12. See Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sep. 30, 2021), <https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx> [<https://perma.cc/6WXP-JU3A>] (noting that the 1997-2021 Gallup polling average of Americans responding that they had a great deal/fair amount of trust in the judicial branch was 68% compared to 52% for the executive branch and 47% for the legislative branch).

13. See Jim Rutenberg, Nick Corasaniti, & Alan Feuer, *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives on*, N.Y. TIMES (Dec. 26, 2020), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [<https://perma.cc/CCJ7-UCFH>]; *Doubt in American System Increases*, MONMOUTH UNIV. POLLING INST. (Nov. 15, 2021), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_111521/ [<https://perma.cc/8LB8-PXTY>].

14. See *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/7PED-U9XT>] (noting that 19 states enacted laws in 2021 that made it harder to vote). Although the use of courts to spread disinformation about American elections raises serious legal ethics concerns, it will not be the focus of this Note.

15. See Kim Bellware & John Wagner, *Letter From 1,500 Attorneys Says Trump Campaign Lawyers don't Have 'License to Lie'*, WASH. POST (Dec. 8, 2020), <https://www.washingtonpost.com/politics/2020/12/08/trump-lawyer-letter/> [<https://perma.cc/2VUG-TQCH>].

16. See *King v. Whitmer*, 556 F. Supp. 3d 680, 734-35 (E.D. Mich. 2021); *Matter of Giuliani*, 146 N.Y.S.3d 266 (N.Y. App. Div. 2021).

17. See McEvoy, *supra* note 1.

18. See Jarrett Renshaw & Joseph Tanfani, *Donations Under \$8k to Trump 'Election Defense' Instead go to President, RNC*, REUTERS, Nov. 11, 2020, <https://www.reuters.com/article/uk-usa-election-trump-fundraising-insigh-idINKBN27R30B> [<https://perma.cc/M2E4-BA9L>].

19. See *id.*

20. See *id.*

21. See McEvoy, *supra* note 1.

December, the Trump campaign spent a comparatively small \$8.8 million on legal challenges and recounts as the majority of the challenges wrapped up.²² Therefore, the vast majority of the money raised for “election defense” was not being used for the advertised election challenges, but rather was for PACs and other accounts with few restrictions on how Trump could spend it.²³ Several commentators described this fundraising prong by Trump and the Republican Party as a “cash cow.”²⁴

Trump’s campaign was not the only one cashing in on the election litigation fundraising efforts. Former Trump “Kraken”²⁵ attorney Sidney Powell created her own legal defense fund, Defending the Republic, that explicitly requested donations to support her election litigation.²⁶ Powell’s group raised more than \$14 million dollars.²⁷ Like the Trump campaign, Powell’s Defending the Republic has not used its funds solely for election litigation as advertised.²⁸ In an ongoing lawsuit against Powell, Dominion Voting Systems claims that she uses Defending the Republic’s funds to pay for her personal legal expenses.²⁹ Indeed, Powell’s access to the funds has raised concerns about the efficacy of monetary sanctions against her.³⁰ In August, a federal judge approved Rule 11 sanctions against Powell and expressed concern that she was profiting off the filing of

22. Bill Allison, *Trump Campaign Spends \$8.8 Million in Effort to Overturn Vote*, BLOOMBERG (Dec. 4, 2020), <https://www.bloomberg.com/news/articles/2020-12-05/trump-campaign-spends-8-8-million-in-effort-to-overturn-vote> [<https://perma.cc/6B9Y-KMK2>].

23. See Renshaw & Tanfani, *supra* note 18.

24. See, e.g., Adam Klasfeld, *Trump Raised a Massive \$207.5 Million Post-Election Haul, and Little of it is Going to the Lawsuits*, LAW & CRIME (Dec. 4, 2020), <https://lawandcrime.com/2020-election/the-trump-campaign-raised-a-massive-207-5-million-post-election-haul-and-little-of-it-is-going-to-the-lawsuits/> [<https://perma.cc/L9YD-SXLU>]; Richard W. Painter, *How Trump’s Election Scam is Still Making Him Money*, MSNBC (Apr. 9, 2021) <https://www.msnbc.com/opinion/how-trump-s-election-scam-still-making-him-money-n1263566> [<https://perma.cc/6GFB-VWDN>].

25. The “Kraken” moniker originated from a statement Powell made on the Fox Business Network that her team of lawyers for President Trump would “release the Kraken.” The saying is a reference to the 1981 movie “The Clash of the Titans,” and became a catchphrase for election fraud conspiracy on social media (ironically, the Kraken is slain by Perseus at the end of the movie). See Davey Alba, *‘Release the Kraken,’ a Catchphrase for Unfounded Conspiracy Theory, Trends on Twitter*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/technology/release-the-kraken-a-catchphrase-for-unfounded-conspiracy-theory-trends-on-twitter.html> [<https://perma.cc/A7GR-6DUS>]; Josho Brouwers, *Clash of the Titans (1981)*, ANCIENT WORLD MAGAZINE (Oct. 19, 2015), <https://www.ancientworldmagazine.com/articles/clash-of-the-titans-1981/> [<https://perma.cc/9PVG-HVG8>].

26. Isaac Stanley-Becker, Emma Brown, & Rosalind S. Helderman, *Prosecutors Demand Records of Sidney Powell’s Fundraising Groups as Part of Criminal Probe*, WASH. POST (Nov. 30, 2021), <https://www.washingtonpost.com/politics/2021/11/30/sidney-powell-defend-the-republic-criminal-probe/> [<https://perma.cc/8U62-UVQ7>] (noting an archived version of Defending the Republic’s website stated that “[o]ver \$500,000 must be raised in the next twenty-four hours for these suits to be filed. Millions more will need to be raised to ensure victory”).

27. See Emma Brown, Rosalind S. Helderman, Isaac Stanley-Becker, & Josh Dawsey, *Sidney Powell Group Raised More Than \$14 Million Spreading Election Falsehoods*, WASH. POST (Dec. 6, 2021), https://www.washingtonpost.com/investigations/sidney-powell-defending-republic-donations/2021/12/06/61bdb004-53ef-11ec-8769-2f4ecd7a2ad_story.html [<https://perma.cc/Z3DD-TELH>].

28. See *id.*

29. See *id.*

30. See *King v. Whitmer*, 556 F. Supp. 3d 680, 734 n.85 (E.D. Mich. 2021).

frivolous election-challenge lawsuits because future sanctions will be paid with donor funds rather than Powell's.³¹

II. MONETARY SANCTIONS

A. TYPES OF MONETARY SANCTIONS

Federal courts have three options for sanctioning attorneys who bring frivolous election lawsuits: (1) Rule 11 of the Federal Rules of Civil Procedure, (2) 28 U.S.C. § 1927, and (3) the court's inherent authority.³² The three options are not mutually exclusive and have been used together in 2020 election litigation cases where courts have issued sanctions.³³ This Part will describe each of these options in turn.

1. RULE 11

Under Rule 11, attorneys must certify that pleadings, written motions, or other papers are “not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”³⁴ Attorneys additionally certify that legal and factual contentions are warranted and have evidentiary support.³⁵ Both of the 2020 election litigation filings that led to sanctions violated Rule 11 because the filers could not substantiate their allegations and unnecessarily prolonged the procedures past when relief could even be granted.³⁶ The Rule provides for sanctions when the court determines that Rule 11(b) has been violated to deter repeated conduct by the party or similar conduct by others.³⁷ The Rule notes that sanctions can include both nonmonetary directives and orders to pay fees directly to the court or attorneys' fees to the other party.³⁸

The purpose of Rule 11 is deterrence of future improper behavior rather than compensation to an injured party.³⁹ Generally, the standard for the imposition of sanctions is an objective standard of reasonableness under the circumstances rather than a subjective good faith standard.⁴⁰ Sanctions available to courts include striking an offending paper, issuing admonitions, reprimands, and

31. *See id.*; *infra* section II(A)(1).

32. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48-49 (1991).

33. *See King v. Whitmer*, 556 F. Supp. 3d 680 (E.D. Mich. 2021).

34. FED. R. CIV. P. 11(b).

35. *Id.*

36. *See King v. Whitmer*, 556 F. Supp. 3d 680, 710-11 (E.D. Mich. 2021) (holding that the plaintiffs violated Rule 11 because their attorneys “did not provide a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law to render their claims ripe or timely, to grant them standing, or to avoid Eleventh Amendment immunity”); *O'Rourke v. Dominion Voting Systems Inc.*, 552 F. Supp. 3d 1168 (D. Colo. 2021).

37. FED. R. CIV. P. 11(c)(1), (4).

38. *Id.*

39. FED. R. CIV. P. 11(b) advisory committee's notes to the 1993 amendment.

40. 95 A.L.R. Fed. 107 § 6(a).

censures, requiring participation in educational programs, ordering a fine, and referring the matter to a disciplinary authority.⁴¹ Although courts have wide discretion in determining the appropriate sanctions, Rule 11 has a structural limit on the amount of sanctions that can be levied—they may not be more severe than necessary to deter repetition of the conduct by the sanctioned attorney or other similar parties.⁴² Thus, the limit on sanctions is the same, whether they are issued in the form of attorneys’ fees or a fine.

2. 28 U.S.C. § 1927

28 U.S.C. § 1927 allows for sanctions related to the excess costs, expenses, and attorneys’ fees incurred as a result of a party who “unreasonably and vexatiously” multiplies and prolongs the proceedings of a case.⁴³ The statute is applicable when attorneys fail to dismiss a case after they have acknowledged that it is moot.⁴⁴ Though it may seem strange to keep arguing a moot case, it was central to Trump’s post-election litigation strategy, as the ongoing nature of the litigation helped drive their disinformation and fundraising efforts.⁴⁵

3. INHERENT AUTHORITY

In addition to sanctions available under Rule 11 or a federal statute, courts retain an inherent authority to sanction bad faith conduct in litigation by awarding attorneys’ fees to the other party.⁴⁶ Although the Court in *Alyeska Pipeline Co. v. Wilderness Society* upheld the ‘American Rule’ against fee shifting and held that only Congress can create exceptions for prevailing litigants to recover attorneys’ fees,⁴⁷ the Court would ultimately clarify this holding nearly twenty years later in *Chambers v. NASCO*. *Chambers* held that, notwithstanding *Alyeska*, Congress’ creation of statutory schemes allowing fee shifting did not displace a court’s inherent authority to issue sanctions for bad-faith conduct.⁴⁸ This inherent authority exception to the ‘American Rule’ is rooted in a federal court’s inherent power to manage its own proceedings and control the conduct of the attorneys and parties who appear before it.⁴⁹

41. FED. R. CIV. P. 11(b) advisory committee’s notes to the 1993 amendment.

42. *Id.* These limits make it difficult to fashion a monetary sanction that will effectively deter frivolous lawsuits given the amount money raised from the litigation. The question of whether a theoretical monetary sanction that matched the amount of money raised could ever be an effective deterrent is outside of the scope of this Note.

43. 28 U.S.C. § 1927.

44. *See King v. Whitmer*, 556 F. Supp. 3d 680, 710-11 (E.D. Mich. 2021).

45. *See id.* at 709-10.

46. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48-49 (1991).

47. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975).

48. *See Chambers*, 501 U.S. at 46.

49. *See id.* at 43-44.

The standard for issuing sanctions under a court's inherent authority is similar to that of FRCP Rule 11,⁵⁰ as the court must find that "the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment."⁵¹ For example, in *Chambers*, the Court allowed for lower courts to use their inherent authority to issue sanctions because plaintiffs used frivolous litigation to harass and delay their opponents, and attempted to deprive the court of jurisdiction via fraud.⁵² However, the reach of available sanctions is more limited than that of Rule 11. Fee shifting under a court's inherent authority must be compensatory rather than punitive, and it can only shift fees incurred because of the identified misconduct as compensation to the prevailing party, rather than shifting all fees to punish the misbehaving party.⁵³ Thus, a party may recover "only the portion of his fees that he would not have paid but for" the misconduct.⁵⁴

B. APPLICATION OF SANCTIONS TO 2020 POST-ELECTION LITIGATION

1. SANCTIONS ISSUED

At the time of writing, courts have issued monetary sanctions in just two 2020 election cases.⁵⁵ In August 2021, Judge N. Reid Neureiter issued sanctions against Trump-aligned attorneys Gary Fielder and Ernest Walker, ordering them to pay attorneys' fees of the defendants under Rule 11, the court's inherent authority, and § 1927.⁵⁶ The plaintiffs alleged, without evidence, that there was a far-reaching conspiracy between multiple government officials and private actors to deprive citizens of their votes, and claimed that the Electors, Due Process, and Equal Protection Clauses of the Constitution were violated.⁵⁷ The court cited several attorney behaviors in justifying sanctions.⁵⁸ Examples of the cited misconduct include, first, the attorneys' lack of inquiry into the alleged facts that they pleaded.⁵⁹ Second, an attempt to mislead the court by citing a TIME article as evidence of election fraud despite the article actually being about efforts to oppose election subversion.⁶⁰ Third, the fact that they filed a lawsuit in Colorado against

50. Note that one significant difference between FRCP Rule 11 and the inherent authority power is that Rule 11 only applies to papers filed with the court whereas inherent authority can reach broader conduct. *See id.* at 42, 46.

51. *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 314 (6th Cir. 1997).

52. *See Chambers*, 501 U.S. at 32, 42-46.

53. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017).

54. *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1187 (citing *Fox v. Vice*, 563 U.S. 826, 836 (2011)).

55. *O'Rourke v. Dominion Voting Systems Inc.*, 552 F. Supp. 3d 1168 (D. Colo. 2021); *King v. Whitmer*, 556 F. Supp. 3d 680 (E.D. Mich. 2021).

56. *O'Rourke v. Dominion Voting Systems Inc.*, 552 F. Supp. 3d 1168, 1207-09 (D. Colo. 2021).

57. *See id.* at 1174.

58. *See id.* at 1201-08.

59. *Id.* at 1201-05.

60. *O'Rourke v. Dominion Voting Systems Inc.*, 552 F. Supp. 3d 1168, 1205-07 (D. Colo. 2021).

state officials from Georgia, Michigan, Pennsylvania, and Wisconsin.⁶¹ The court ordered that the plaintiffs pay sanctions in the form of attorneys' fees rather than a fine payable to the court, but did not issue any non-monetary sanctions.⁶²

Later in August, Judge Linda Parker ordered sanctions against multiple Trump-aligned attorneys, including high profile names like Sidney Powell and Lin Wood, under Rule 11, the court's inherent authority, and § 1927.⁶³ The plaintiffs claimed that Michigan did not administer its election in compliance with Michigan law, in violation of the Electors and Equal Protection Clauses.⁶⁴ The court cited multiple examples of bad faith actions. First, the filing an emergency motion asking the court to publicly release the recording of an earlier proceeding to enable "citizens to draw their own inferences from the presentations instead of depending on media presentations;" second, asserting that the allegations in their pleadings were opinion rather than fact to advance the attorney's political positions and; third, the attorneys' failure to conduct a pre-filing inquiry into the accuracy of their claims.⁶⁵ Ultimately, the court ordered that the plaintiff's counsel pay attorneys' fees to the defendants.⁶⁶ However, the sanctions ordered, totaling \$175,250.37 in attorneys' fees,⁶⁷ paled in comparison to the \$14,000,000 plus raised by Defending the Republic.⁶⁸ Nevertheless, the court took an extra step beyond the Colorado court's sanctions and ordered non-monetary sanctions.⁶⁹ The court ordered that the plaintiff's attorneys complete mandatory continuing legal education in the subject matter of the lawsuit and referred the attorneys to their respective state bars for investigation into potential violations of ethics rules.⁷⁰

2. POTENTIAL FUTURE SANCTIONS AND THEIR EFFECT

As noted, the purpose of monetary sanctions is to deter future improper behavior, both by the parties and attorneys who are acting improperly, as well as others who are similarly situated.⁷¹ However, as applied in the 2020 election cases, the monetary sanctions alone appear to be ineffective in deterring abuse of the legal process for political gain.

61. *Id.* at 1208.

62. *Id.* at 1208-09.

63. *King v. Whitmer*, 556 F. Supp. 3d 680, 734-35 (E.D. Mich. 2021).

64. *See id.* at 690-91.

65. *See id.* at 725-28.

66. *See id.* at 734-35.

67. *King v. Whitmer*, No. 20-13134, 2021 WL 5711102, at *10 (E.D. Mich. Dec. 2, 2021).

68. Brown, Helderman, Stanley-Becker, & Dawsey, *supra* note 27. The court in *King* recognized the amounts being raised by Defending the Republic, noting that the attorneys being sanctioned had the ability to pay the sanction due to their fundraising efforts, citing the Defending the Republic website. *See King v. Whitmer*, No. 20-13134, 2021 WL 5711102, at *10 (E.D. Mich. Dec. 2, 2021).

69. *See King v. Whitmer*, No. 20-13134, 2021 WL 5711102, at *41 (E.D. Mich. Dec. 2, 2021).

70. *See id.*

71. FED. R. CIV. P. 11(b) advisory committee's notes to the 1993 amendment.

Commentators have argued that much or all of Trump and allies' post-election litigation was filed in bad faith and violates Rule 11, making sanctions necessary to uphold the integrity of the judicial process.⁷² The violations may even be so perverse that if sanctions are not issued, then "the purpose behind Rule 11 has effectively been read out of existence, and the rule serves as no deterrent to future frivolities and perhaps even more outrageous legal claims."⁷³ However, these same commentaries fail to identify that, even where Rule 11 is applied, its deterrent effect is minimized because violators can pay the sanction with the money that they have raised off the litigation.⁷⁴

Generally, the court-ordered sanctions discussed above, under all three options, are in the form of monetary sanctions—either a fine paid to the court, or the award of attorneys' fees to the other party—whereas nonmonetary sanctions, like disciplinary referrals, are rarer.⁷⁵ This means that the actions that Judge Parker took in ordering a referral to disciplinary authorities are somewhat extraordinary, but also likely necessary for a reason that the court noted in a footnote.⁷⁶ The court said "[w]hat is concerning is that the sanctions imposed here will not deter counsel from pursuing future baseless lawsuits because those sanctions will be paid with donor funds rather than counsel's. In this court's view, this should be considered by any disciplinary authority reviewing counsel's behavior."⁷⁷

The court's comments in this footnote highlight the weakness of monetary sanctions against frivolous litigation that is being used as part of a fundraiser: The monetary sanctions will not effectively deter the filing of future fundraising lawsuits because the monetary sanctions do not flip the incentive away from filing frivolous litigation. Remember that Powell's group raised more than \$14 million,⁷⁸ and Trump's campaign raised over \$200 million.⁷⁹ This influx of cash allows attorneys to continue to file frivolous election litigation to spread misinformation in the future because it is such a potent fundraising tool and, even after sanctions, attorneys will be financially better off having filed the litigation.

Indeed, the Michigan sanctions appear not to have deterred further fundraising efforts based on tedious legal claims. In September, a month after the Michigan sanctions were issued, Powell filed a baseless counterclaim to a defamation

72. See Brendan Williams, *Did President Trump's 2020 Election Litigation Kill Rule 11?*, 30 B.U. PUB. INT. L.J. 181, 214 (2021); Joyce Gist Lewis & Adam M. Sparks, *In Defense of the Foundation Stone: Deterring Post-Election Abuse of the Legal Process*, 55 GA. L. REV. 1649, 1674-75 (2021).

73. See Williams, *supra* note 72, at 214.

74. See *id.*

75. See Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 791-95 (2004).

76. See *King v. Whitmer*, 556 F. Supp. 3d 680, 734 n.85 (E.D. Mich. 2021).

77. *Id.*

78. See Brown, Helderman, Stanley-Becker, & Dawsey, *supra* note 27.

79. See McEvoy, *supra* note 1.

lawsuit against her by Dominion Voting Systems making claims about the weaknesses of Dominion voting equipment and Dominion's ability to "flip" votes.⁸⁰ Powell's counterclaim is advertised on Defending the Republic's website,⁸¹ which also advertises a (now dismissed) lawsuit against the Department of Defense and Food and Drug Administration about the military COVID-19 vaccine mandate, a Supreme Court amicus brief in the challenge of the OSHA workplace vaccine mandate,⁸² and a commitment to defending January 6th rioters,⁸³ all while soliciting donations to fund such cases on the website's home page.⁸⁴

The threat of sanctions has not stopped Trump and allies from bringing likely unsuccessful litigation and fundraising off it, either. In July 2021, Trump launched a lawsuit against Google, Facebook, and Twitter over censorship that challenged his ban from those sites.⁸⁵ Some legal experts were quick to point out that such a claim would be barred by the state action doctrine.⁸⁶ Nevertheless, Save America simultaneously launched a fundraising campaign, writing "President Trump is filing a LAWSUIT against Facebook and Twitter for UNFAIR CENSORSHIP!"⁸⁷ Another nonprofit, the America First Policy Institute, also launched a fundraising effort off the lawsuits, where they asked supporters of the lawsuits to sign on as "co-plaintiffs," on their website, though the website stated that signing did not actually make donors a plaintiff.⁸⁸ Though some have described the case as frivolous,⁸⁹ judges have not yet weighed in. One thing that is clear: Trump and allies are employing the same strategy – using the lawsuits to legitimize their claims and drum up supporters to raise money for his PAC.

80. *Kraken Answer*, DEFENDING THE REPUBLIC, <https://defendingtherepublic.org/wp-content/uploads/2021/09/KRAKEN-ANSWER-AND-CC-1.pdf> [<https://perma.cc/BG8F-ML3C>] (last visited March 11, 2022).

81. *Dominion Counterclaim*, DEFENDING THE REPUBLIC, <https://defendingtherepublic.org/dominion-counterclaim/> [<https://perma.cc/KS8V-TJE9>] (last visited March 11, 2022).

82. *Push Back Against Mandatory COVID-19 Vaccinations*, DEFENDING THE REPUBLIC, <https://defendingtherepublic.org/covid/> (last visited March 11, 2022) [<https://perma.cc/24Z4-EEDF>].

83. *January 6th*, DEFENDING THE REPUBLIC, <https://defendingtherepublic.org/january-6th/> (last visited March 11, 2022) [<https://perma.cc/43S6-RSZM>].

84. DEFENDING THE REPUBLIC, <https://defendingtherepublic.org/> (last visited March 11, 2022) [<https://perma.cc/7UL3-2YR9>].

85. Matthew Brown, *Justice Department Intervenes in Trump Lawsuit Against Big Tech to Defend Section 230*, USA TODAY (Nov. 22, 2021), <https://www.usatoday.com/story/news/politics/2021/11/22/justice-department-defends-section-230-trumps-big-tech-lawsuit/8717364002/> [<https://perma.cc/AP2V-NZ3B>].

86. *See, e.g.*, Steve Vladeck (@steve_vladeck) Twitter (Jul. 7, 2021 11:49 AM) https://twitter.com/steve_vladeck/status/1412800983676198913 [<https://perma.cc/4EKQ-ZXXF>].

87. *Breaking News!*, SAVE AMERICA, <https://secure.winred.com/save-america-joint-fundraising-committee/trump-lawsuit-fb-twitter/?exitintent=true> [<https://perma.cc/QT46-CF6G>] (last visited Feb. 28, 2022).

88. *See* Roger Sollenberger, *Trump's Tech Lawsuit Already Turning into Fundraising Scheme*, THE DAILY BEAST (July 10, 2021), <https://www.thedailybeast.com/donald-trumps-tech-lawsuit-already-turning-into-fundraising-scheme> [<https://perma.cc/S3NL-SX8S>].

89. Mychael Schnell, *Trump on Big Tech lawsuit: 'If they can do it to me, they can do it to you'*, THE HILL (Jul. 8, 2021), <https://thehill.com/homenews/administration/562112-trump-on-big-tech-lawsuit-if-they-can-do-it-to-me-they-can-do-it-to> [<https://perma.cc/6QTE-YY4C>].

Of course, election-related litigation may not always be such an effective fundraiser for political candidates and others interested in the outcome of the election.⁹⁰ However, the fact remains that attorneys and clients used frivolous claims to spread disinformation via the courts and profit off the effort, and without a deterrent, may be incentivized to do so again after future elections.

Finally, the effectiveness of a referral to a disciplinary authority is dependent on whether the authority acts on the referral. Evidence shows that there is a lack of correlation between Rule 11 sanctions and subsequent attorney discipline for the conduct that violated Rule 11.⁹¹ This means that the actions of courts and disciplinary authorities are of the utmost importance in determining the efficacy of deterring future frivolous lawsuits, which this Note will now turn to.

III. PROFESSIONAL SANCTIONS

To understand why fundraising efforts should be considered in disciplinary proceedings, it is important to understand the grounds on which professional sanctions can be levied under ethics rules, the types of sanctions that are available, and examples of how those sanctions have been applied against Trump-allied attorneys both in the past and in response to 2020 election litigation and statements.

A. GROUNDS FOR PROFESSIONAL SANCTIONS

In the wake of the 2020 Trump lawsuits, many commentators pointed to some of the American Bar Association (ABA)'s model rules as a potential source for sanctions.⁹² Rule 3.1 of the ABA's *Model Rules of Professional Conduct* states, in part, that, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."⁹³ Relatedly, Rule 3.3 establishes that a lawyer cannot "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."⁹⁴

These rules are somewhat in tension with what are known as the "zealous" advocacy requirements in the *Model Rules*.⁹⁵ Though none of the rules expressly require zealous advocacy, several provisions in the *Rules* suggest it. First, the preamble to the *Model Rules* establishes that, "[a]s [an] advocate, a lawyer zealously

90. President Trump's fundraising efforts declined sharply after Joseph Biden was inaugurated as the 46th President of the United States. See Renshaw & Tanfani, *supra* note 18.

91. See Joy, *supra* note 75, at 813-14.

92. See, e.g., Melissa Heelan, *Election Fraud Cases Sow Doubts About Legal Profession's Future*, BLOOMBERG (Sep. 14, 2021) <https://news.bloomberglaw.com/us-law-week/election-fraud-cases-sow-doubts-about-legal-professions-future> [<https://perma.cc/W56X-JYU2>].

93. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2018) [hereinafter MODEL RULES].

94. MODEL RULES R. 3.3.

95. See MODEL RULES pmbli.; MODEL RULES R. 1.3 cmt. 1.

asserts the client's position under the rules of the adversary system."⁹⁶ Relatedly, Rule 1.3 requires that lawyers act with "reasonable diligence and promptness" in representing their clients.⁹⁷ The Comment to Rule 1.3 further explains that "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."⁹⁸

The Comments to Rules 1.3 and 3.1 attempt to resolve this tension. They establish that an attorney does not need to press for every potential advantage for a client and that they have "professional discretion" to determine how to pursue matters.⁹⁹ Further, lawyers have a duty to not abuse legal procedure or file frivolous proceedings, which occurs when "the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."¹⁰⁰

Though each state has some version of Rule 3.1,¹⁰¹ the standard for frivolous litigation is not applied consistently. Some states determine whether litigation is frivolous on an objective basis, like FRCP Rule 11.¹⁰² For example, Michigan uses an objective, "disinterested lawyer," standard that requires a lawyer to make a "reasonable inquiry" into the facts that support their claim.¹⁰³ On the other hand, New York uses a subjective standard, defining a claim as frivolous in three situations: 1) "where a lawyer knowingly advances a claim or defense unwarranted under existing law," except for a good faith argument for a change in the law; 2) where the conduct does not have a reasonable purpose other than delaying or prolonging the litigation, or harassing or maliciously injuring someone; and 3) where a lawyer makes false factual statements.¹⁰⁴

While Rules 3.1 and 3.3 apply to attorney conduct in litigation and in the courtroom, some rules go further, potentially applying to attorney conduct anywhere. For example, Rule 8.4, titled "Maintaining The Integrity Of The Profession," is broader than 3.1 and 3.3 and can reach attorney conduct outside of the courtroom.¹⁰⁵ Among other things, it prevents an attorney from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation."¹⁰⁶ Rule 8.4 has been applied to attorney dishonesty to non-clients in a wide variety of settings,

96. MODEL RULES pmb1.

97. MODEL RULES R. 1.3.

98. MODEL RULES R. 1.3 cmt. 1.

99. See MODEL RULES R. 1.3 cmt. 1; MODEL RULES R. 3.1 cmt. 1-2.

100. MODEL RULES R. 3.1 cmt. 1-2.

101. *Variations of the Model Rules of Professional Conduct*, ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_1.pdf (last accessed January 6, 2022) [<https://perma.cc/X5R8-MWRE>].

102. See 95 A.L.R. Fed. 107 § 6(a).

103. Michigan Bar Ethics Opinion, R-009, https://www.michbar.org/opinions/ethics/numbered_opinions/r-009 [<https://perma.cc/Z5SB-YE74>].

104. N.Y. RULES OF PROF'L. CONDUCT R. 3.1 (N.Y. State Bar Ass'n 2020).

105. MODEL RULES R. 8.4.

106. MODEL RULES R. 8.4.

including an attorney who used funds from a group who pooled their money to buy season baseball tickets for his own personal use,¹⁰⁷ and an attorney falsely stating that they had a license to be a home improvement contractor.¹⁰⁸ Additionally, Rule 4.1 prohibits attorneys from making untruthful statements to non-clients “in the course of representing a client.”¹⁰⁹ For example, Rule 4.1 is often applied when an attorney makes a false statement during a negotiation.¹¹⁰ These rules make clear disciplinable conduct can happen outside of the courtroom.

B. TYPES OF PROFESSIONAL SANCTIONS

When there is a finding of misconduct under one of the *Model Rules*, ABA Model Rules for Lawyer Disciplinary Enforcement Rule 10 provides for eight types of sanctions: disbarment, suspension, probation, reprimand, admonition, restitution, assessment of costs, and limitations on the nature and extent of an attorney’s future practice.¹¹¹ In imposing sanctions, the Rule provides four factors to consider: 1) whether a “duty to a client, to the public, to the legal system, or the profession” has been violated; 2) “whether the lawyer acted intentionally, knowingly, or negligently;” 3) “the amount of actual or potential injury caused;” and 4) “the existence of any aggravating or mitigating factors.”¹¹²

The commentary to Rule 10 lists numerous aggravating and mitigating factors. Aggravating factors including prior disciplinary offenses, a dishonest or selfish motive, and a pattern of misconduct.¹¹³ Mitigating factors listed include an “absence of prior disciplinary record,” an “absence of dishonest or selfish motive,” “personal or emotional problems,” and a timely “good faith effort to make restitution.”¹¹⁴

C. SANCTIONS LEVIED & ISSUED AGAINST TRUMP & ALLIES

To understand how the above rules are applied, it is best to examine their application to Trump-aligned attorneys. The rules have been levied against Trump-allied attorneys by various groups from the beginning of his presidency, but the efforts have only recently begun to gain traction with disciplinary bodies with the post-election litigation.

Numerous Trump-allied attorneys faced ethics complaints during the Trump presidency, with the complaints used as a political tool in a resistance movement

107. See *People v. Rishel*, 50 P.3d 938 (Colo. O.P.D.J. 2002).

108. See *Att’y Grievance Comm’n of Md. v. Young*, 124 A.3d 210 (Md. 2015).

109. MODEL RULES R. 4.1.

110. See, e.g., *In Re Rosen*, 198 P.3d 116 (Colo. 2008).

111. ABA MODEL RULES OF DISCIPLINARY ENFORCEMENT (2012) R. 10. [hereinafter MODEL RULES OF DISCIPLINARY ENFORCEMENT].

112. MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 10.

113. MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 10 Commentary.

114. MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 10 Commentary.

to Trump in what Professor Brian Sheppard deemed the “Ethics Resistance.”¹¹⁵ Ethics Resistance complaints included claims that Trump-advisor Kellyanne Conway violated the D.C. Rules of Professional Conduct 8.4(c)¹¹⁶ for both her false statements about the crowd size at Donald Trump’s inauguration and about a ban by President Obama on the Iraqi refugee program.¹¹⁷ Trump’s Attorney General, Jeff Sessions, faced complaints under the New Jersey analogue of the same rule for his false comments to the Senate Judiciary Committee about his contacts with Russian Officials.¹¹⁸ The complaints in both cases were unsuccessful because the disciplinary bodies did not take up the claims and did not explain their reasoning.¹¹⁹ One element that made the Ethics Resistance unique was its reliance on Model Rule 8.4 and state level analogues as “catch all” provisions of the rules.¹²⁰

Though efforts to use “catch all” provisions like Rule 8.4 were largely unsuccessful in the Ethics Resistance, significantly, New York showed an openness to using the Rule in complaints about conduct surrounding the 2020 elections. In 2021, Trump-ally Rudy Giuliani was suspending from practice on an emergency basis in New York.¹²¹ The court found that Giuliani violated New York Rules of Professional Conduct Rules 3.3, 4.1, and 8.4, the New York analogues to the same-numbered Model Rules discussed above.¹²² The decision focused on the many false claims that Giuliani made, both in court and in public, such as his claim that more mail-in ballots were returned in Pennsylvania than were requested,¹²³ his characterization of an Equal Protection complaint as a fraud case when he appeared as an attorney for Trump in a United States District Court in Pennsylvania,¹²⁴ his statements that dead people voted in Philadelphia, and claims that thousands of underage voters voted illegally in Georgia.¹²⁵

Notably, the court used Rules 4.1 and 8.4 to sanction statements that were not made in the courtroom.¹²⁶ The opinion highlighted the fact that many of Giuliani’s statements were made to spread disinformation about the 2020 election and erode public confidence in the outcome and that he was using the authority of his position as an attorney to do so.¹²⁷ It tied Giuliani’s actions directly to the January 6th attack on the Capitol, writing that:

115. See Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235-37 (2019).

116. This rule is the D.C. analogue to *Model Rule* 8.4 discussed above.

117. See Sheppard, *supra* note 115, at 245-46.

118. See *id.* at 248-51.

119. See *id.* at 245-45, 248-52.

120. See *id.* at 268.

121. Matter of Giuliani, 146 N.Y.S.3d 266, 268 (N.Y. App. Div. 2021).

122. See *id.* at 274.

123. See *id.* at 272.

124. See *id.* at 274.

125. See *id.* at 277.

126. See *id.* at 283.

127. See Matter of Giuliani, 146 N.Y.S.3d 266, 283 (N.Y. App. Div. 2021).

One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections.¹²⁸

Ultimately, the court held that Giuliani posed an “immediate threat to the public” because of his violations of the rules and revoked his law license pending a full disciplinary review and hearing.¹²⁹

Though the court did not explicitly tie Giuliani’s disinformation statements to the parallel Republican fundraising effort, Giuliani was very much involved. For example, one Trump campaign fundraising email directly cited Giuliani’s press conference where he appeared with Powell and other attorneys and falsely claimed that the election had been stolen from President Trump, stating “[d]id you watch my legal team’s press conference yesterday? They were SPECTACULAR. Rudy Giuliani is exactly right. I was WAY AHEAD of Joe Biden on Election Night, and yet, when we woke up the next morning, I was down. How is that possible?”¹³⁰ The statements the court cited in suspending Giuliani’s law license were among the leading drivers of the joint disinformation and fundraising effort by the Trump campaign.

Because Giuliani’s license to practice was revoked, the deterrent effect is likely stronger than that of the prior-discussed cases where monetary sanctions were issued for two reasons. First, Giuliani can no longer make statements, in court or otherwise, with the authority of being a licensed attorney, thus taking away his platform to spread misinformation and raise money. Second, by revoking the license, New York is demonstrating that it will take future cases where similar statements are made seriously. The threat of severe sanctions, such as losing one’s law license, can go much further than monetary sanctions, particularly for younger attorneys who might otherwise emulate the behavior of notorious Trump-aligned attorneys.¹³¹

IV. CONSIDERING FUNDRAISING SCHEMES IN SANCTIONING

Given the availability of monetary and disciplinary sanctions, as well as the conduct of litigants in the 2020 election suits, courts and other reviewing authorities should consider litigation-based fundraisers when deciding what sanctions to levy against attorneys in disciplinary proceedings. This will maximize the deterrent effect given the relatively unique circumstances of Trump’s disinformation and fundraising efforts while protecting legitimate litigation-based fundraising

128. *Id.*

129. *See id.* at 281.

130. *See* Tal Axelrod, *Trump Camp Fundraises off Giuliani Press Conference*, THE HILL (Nov. 20, 2020), <https://thehill.com/homenews/campaign/526953-trump-camp-fundraises-off-giuliani-press-conference> [https://perma.cc/V4HM-Y9AY].

131. *See* Peter A. Joy & Kevin C. McMunigal, *The Ethics of Trump’s Lawyers?*, 36 SPG CRIM. JUST. 62, 67 (2021).

interests. And it can be done in a way that minimizes the risk of making the disciplinary process partisan.

A. DETERRENT EFFECT

The ABA notes that the generally agreed on purposes of attorney discipline include protection of the public, maintaining the integrity of the legal system, assurance of fair administration of justice, and deterring other lawyers from similar misconduct.¹³² By issuing professional sanctions, such as suspensions and disbarments, these goals are better realized than where monetary sanctions are issued.

As mentioned, without nonmonetary professional sanctions, the math simply favors bringing frivolous lawsuits even if an attorney risks monetary sanctions in doing so. Sidney Powell's sanctions exemplify this tradeoff. Powell was sanctioned \$175,250.37 in attorneys' fees,¹³³ whereas *Defending the Republic* raised more than \$14,000,000 from its litigation.¹³⁴ Therefore, *Defending the Republic* has money on hand to pay the sanctions while still making a significant profit. The lack of a deterrent effect is further evidenced by the fact that *Defending the Republic* continues to file dubious lawsuits and use them for fundraising efforts.¹³⁵ Relatedly, it is likely that issuing more severe sanctions, such as suspensions or disbarments, under the *Rules* will deter future lawyers from emulating the behavior.¹³⁶

It may be that the filing of frivolous lawsuits as a pretext for fundraising itself is a violation of ethical rules subject to sanction, but courts need not go that far here.¹³⁷ A frivolous lawsuit will necessarily violate Rule 3.1, so there will be at least one violation that a disciplinary authority can review. However, increased attention and focus on the fundraising efforts may have additional positive deterrent effects.

Courts have already determined in some 2020 election cases, and likely more, that attorneys should be subject to sanctions. In deciding what sanctions to issue, now and in the future, courts should opt towards professional discipline over monetary sanctions in cases of frivolous election litigation by losing candidates because such lawsuits raise large amounts of funds.

B. A POTENTIAL APPROACH

One possible route for courts and other disciplinary authorities to consider the fundraising in a disciplinary proceeding is to treat it as an "aggravating factor"

132. See ABA, ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS (2015).

133. *King v. Whitmer*, No. 20-13134, 2021 WL 5711102, at *10 (E.D. Mich. Dec. 2, 2021).

134. Brown, Helderman, Stanley-Becker, & Dawsey, *supra* note 27.

135. See *supra* notes 64-67.

136. See Joy & McMunigal, *supra* note 131, at 64.

137. See Stephen F. Rhode, *Professional Ethics for Individuals and the Nation*, L.A. LAW. at 16 (Apr. 2021).

under Model Rules for Lawyer Disciplinary Enforcement Rule 10.¹³⁸ As noted earlier, one of the possible aggravating factors that the commentary to the rule points to is a dishonest or selfish motive.¹³⁹ It is possible that the fundraising schemes that the litigation supports qualify as a dishonest or selfish motive, and disciplinary authorities should fully explore this option.

Disciplinary authorities have applied dishonesty and selfishness as aggravating factors in a variety of situations. For example, courts have held that misappropriating client funds for personal use is a selfish and dishonest motive that can aggravate misconduct in disbarment proceedings.¹⁴⁰ Further, actions do not necessarily need to be directly related to an attorneys' clients to be considered dishonest and selfish. For example, a Washington attorney was disbarred for, among other things, filing frivolous lawsuits.¹⁴¹ The fact that he retroactively changed the appraised value of a piano to get back at his brother for joining a lawsuit against him was considered dishonest and selfish, and was thus an aggravating factor.¹⁴²

While the fundraising schemes are not misappropriating the funds of *clients*, an argument can be made that they are misappropriating the funds of *donors*. Attorneys, nonprofits, and campaigns bringing these lawsuits are using the authority of the court to promote false notions of voter fraud and raise large sums of money. They use the fact that they are filing lawsuits to legitimize their claims and raise more funds.¹⁴³ However, the fundraisers are not being fully truthful about two things. First is the veracity of the facts that the efforts are based on. There was no election fraud in the 2020 election, and lawsuits making these claims have been thoroughly rejected by courts.¹⁴⁴ Second is where donors' funds are being spent. As noted earlier, the fundraising schemes are at best deceptive and at worst fraudulent, with very little of the money actually going towards the litigation and most of it being available for campaigns or nonprofits to spend it as they wish, benefiting the very people requesting money from donors.¹⁴⁵ Therefore, there are elements of the fundraising schemes that are both dishonest and selfish.

138. MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 10.

139. MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 10, Commentary.

140. *See, e.g.*, In Re Disciplinary Action Against Brost, 850 N.W.2d 699, 705 (Minn. 2014); In Re Kayira, 614 S.W.3d 530, 539 (Missouri 2021); People v. Lefly, 902 P.2d 361, 364 (Colo. 1995).

141. *See* In Re Disciplinary Proceedings Against Jones, 338 P.3d 842, 857-58 (Wash. 2014).

142. *See id.*

143. Editorial Board, *Trump Fundraiser to Challenge Voting Results is the Real Election Fraud*, USA TODAY (Dec. 2, 2020), <https://www.usatoday.com/story/opinion/todaysdebate/2020/12/02/donald-trump-fundraising-challenge-voting-results-election-fraud-editorials-debates/3782460001/> [<https://perma.cc/6EKN-LAMT>].

144. *See* Long & White, *supra* note 2.

145. *See* Renshaw & Tanfani, *supra* note 18.

This dishonesty has even led to litigation of its own.¹⁴⁶ When it became clear that the 2020 election suits were not using their fundraised dollars to finance the advertised lawsuits, some donors to these Trump-affiliated organizations felt duped, with media reports calling the scheme “the real election fraud.”¹⁴⁷ Indeed, one conservative donor, Fred Eshelman, donated \$2.5 million to True the Vote, a conservative nonprofit that sought donations for legal challenges to the 2020 election results.¹⁴⁸ A short time later, Eshelman sued the group, claiming that it did not spend his donation as it said that it would.¹⁴⁹ Though Eshelman has yet to see much success in his suits, they nonetheless highlight the ways that at least some donors feel that their funds have been misappropriated in a misleading or dishonest way.

Additionally, reports indicate that the House Select Committee to Investigate the January 6th Attack on the United States Capitol is also investigating the impact of dishonesty in the Trump fundraising scheme and whether it was fraudulent.¹⁵⁰ The investigation reportedly includes the use of donation solicitations to spread misinformation, as well as whether the solicitations violated federal wire fraud laws by promoting the stolen election narrative despite knowing such claims were false.¹⁵¹ The January 6th Committee may very well release even more evidence of fraud and dishonesty, which would add on to all the publicly known dishonesty discussed above.

This is just one possible way that courts and disciplinary authorities can use the fundraising campaigns to issue a professional sanction that will better deter future misconduct than the issuance of monetary sanctions. It is not necessarily the only way.

C. OTHER CONSIDERATIONS

By issuing disciplinary rather than monetary sanctions, courts and disciplinary authorities can maximize the deterrent effect against frivolous election litigation. However, unintended impacts of this approach must still be considered, such as

146. See Shawn Boburg and Jon Swaine, *A GOP Donor Gave \$2.5 Million for a Voter Fraud Investigation. Now He Wants His Money Back*, WASH. POST (Feb. 15, 2021), https://www.washingtonpost.com/investigations/true-vote-lawsuit-fraud-eshelman/2021/02/15/a7017adc-6724-11eb-886d-5264d4ceb46d_story.html [https://perma.cc/HFR7-B9L4].

147. See Editorial Board, *supra* note 143.

148. See Shawn Boburg and Jon Swaine, *supra* note 146.

149. See Verified Amended Complaint at 16, *Eshelman v. True the Vote, inc.*, No. 4:20-cv-004034, 2020 WL 10710095 (S.D. Tex. Dec. 31, 2020). A separate lawsuit in Texas state court was dismissed for lack of standing and is currently under appeal. See Appellant’s Brief at 3, *Eshelman v. Trust the Vote, Inc.*, No. 14-21-00279 2021 WL 3832260 (Tex. Ct. App. August 19, 2021).

150. See Josh Dawsey, Jacqueline Alemany, & Tom Hamburger, *Inside the Jan. 6 Committee’s Effort to Trace Every Dollar Raised and Spent Based on Trump’s False Election Claims*, WASH. POST. (Mar. 8, 2022), <https://www.washingtonpost.com/politics/2022/03/08/jan-6-fundraising-trump/> [https://perma.cc/K6NS-5SFN].

151. See *id.*

legitimate litigation-based fundraising, or the risk of politicizing the disciplinary process.

1. LEGITIMATE LITIGATION-BASED FUNDRAISING

By considering the fundraising efforts an aggravating factor in determining what sanctions to apply where there has already been a finding of misconduct, the risk of penalizing legitimate fundraising efforts is minimized because there must be an underlying violation of the *Rules* before the fundraising is considered at all.

Trump, Powell, Giuliani, and other 2020 election fraud litigants are not the first organizations to actively leverage ongoing litigation efforts in fundraising efforts. Many organizations, like the ACLU and the NAACP Legal Defense Fund, regularly solicit donations to fund legal challenges.¹⁵² Such fundraising efforts have been challenged in the past not as grounds for sanctions, but rather as grounds for relief from sanctions. In *McLean v. Arkansas Board of Education*, a statute allowed for plaintiffs to collect attorneys' fees from successful civil rights lawsuits.¹⁵³ Defendants challenged the successful plaintiffs' award of attorneys' fees, arguing that the ACLU's fundraising dollars from the litigation made the award of attorneys' fees inequitable, so the amount the ACLU raised but-for the litigation should be subtracted from the award.¹⁵⁴ The Eighth Circuit rejected this argument, holding that specific fundraising by an organization is irrelevant to the award of attorneys' fees under the statute because the line between general and specific fundraising was not clear, and that precedent allowing for general legal fundraising was applicable.¹⁵⁵ These efforts demonstrate that fundraising off of specific legal challenges is a legitimate act that organizations can (and, in many cases, should) do.

However, the fundraising by Trump, Powell, and others related to the 2020 election litigation is fundamentally different than that conducted by the ACLU, NAACP, and other legal organizations. First, the Trump lawsuits were without merit, and were thoroughly rejected by courts.¹⁵⁶ Second, as many have argued, the lawsuits were likely a pretext for the political and fundraising efforts, rather than serious legal challenges.¹⁵⁷ Ultimately, any disciplinary action would still require a violation of ethical rules. This means that, because they are not at risk of

152. See, e.g., *New GoFundMe to Protect Reproductive Rights Across the U.S.*, ACLU (June 21, 2019), <https://www.aclu.org/press-releases/fight-back-protect-abortion-access-gofundme-launched-support-aclu-planned-parenthood> [<https://perma.cc/GD3R-JJK5>].

153. *McLean v. Ark. Bd. of Educ.*, 723 F.2d 45, 47 (8th Cir. 1983).

154. See *id.* at 48.

155. See *id.* at 48-49.

156. See, e.g., *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1331 (N.D. Geo. 2020); *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 Fed. Appx. 377, 391 (3d Cir. 2020); *Feehan v. Wisconsin Elections Commission*, 506 F. Supp. 3d 596 (E.D. Wisc. 2020).

157. See Soo Rin Kim & Will Steakin, *How Trump, RNC Raised Hundreds of Millions Pushing Baseless Election Fraud Claims*, ABC News (Feb. 2, 2021), <https://abcnews.go.com/US/trump-rnc-raised-hundreds-millions-pushing-baseless-election/story?id=75633798> [<https://perma.cc/84TR-98FY>].

violating ethics rules, legitimate fundraising efforts will not be improperly penalized in ethics proceedings.

2. POLITICIZATION OF THE DISCIPLINARY PROCESS

Multiple articles and commentators have warned that pursuing sanctions against Trump-aligned attorneys risks politicizing the disciplinary process.¹⁵⁸ However, first, as Sheppard points out, even before the 2020 election, disciplinary authorities were already engaged in political disputes.¹⁵⁹ Given this fact, disciplinary authorities should do the best job that they can applying the ethics rules of their jurisdiction, even if the results may be seen as political. Second, courts and disciplinary are already finding violations of legal ethics rules. Changing the approach and the sanctions issued to maximize the intended deterrent effect as suggested here does not risk increasing the volume of proceedings that would be considered political. Rather, if the deterrence works as intended, it should decrease the number of proceedings in the future. Finally, inaction may not save disciplinary authorities from being seen as political, as opponents of Trump may see inaction as a free pass for Trump and allies to abuse the judicial process in the future. And, without an effective deterrent, the entire judicial system risks becoming a political disinformation and fundraising tool. With these considerations in mind, focusing on professional over monetary sanctions poses little risk of politicizing the disciplinary process any more than it already is.

CONCLUSION

Trump and allies launched a three-pronged attack on the 2020 election results. Courts rebuffed the first one, the attempt to overturn the results via an onslaught of litigation. Now, courts have the chance to help rebuff the other two—the spread of disinformation and fundraising due to the litigation. Litigants like Powell and Trump used the legitimacy of the courts to profit off the spread of harmful misinformation and, because of those same profits, monetary sanctions will not serve as an effective deterrent to future efforts in future elections. Ethics rules can be a key tool to curb these efforts and stop courts from being used to undermine legitimate election results and dupe donors out of funds. Courts and other disciplinary authorities should utilize nonmonetary, professional sanctions to deter future baseless lawsuits that are damaging not only to the legal profession, but to the public at large. Courts have the ultimate authority to determine who can argue before them, and to shape the conduct of those who make those arguments. They should use that authority to ensure that courts are not being used to bankroll the spread of election lies and misinformation.

158. See Sheppard, *supra* note 115, at 234; William J. Wernz, *What Would a Discipline Office Do?*, 78 BENCH AND BAR OF MINN. 26, 28 (2021).

159. See Sheppard, *supra* note 115, at 234.